Filed 10/27/09 P. v. Cordon CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. WALTER JOSE CORDON, Defendant and Appellant.	B208889 (Los Angeles County Super. Ct. No. KA081431)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mike Camacho, Judge. Affirmed in part, modified in part.

Jeanine G. Strong, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Walter Jose Cordon appeals from the judgment entered upon his conviction by jury of three counts: second degree commercial burglary (Pen. Code, § 459, count 1);[1] grand theft of personal property (§ 487, subd. (a), count 2); and grand theft auto (§ 487, subd. (d)(1), count 3). He waived trial on the allegations that he had served four prior prison terms within the meaning of section 667.5, subdivision (b), and admitted them as true. He was sentenced to state prison for six years as follows: The court selected the midterm of two years on count 1; imposed the midterm of two years each on counts 2 and 3 to run concurrently to count 1; and added four consecutive one-year terms for the four prison term enhancements.

Appellant contends the trial court erred by (1) admitting evidence of his statements made to a police officer because he claims the statements were obtained in violation of his Fifth Amendment right to warnings under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*),[2] and (2) imposing punishments on both the burglary and grand theft counts in violation of section 654. We disagree that the statements were inadmissible, but agree that multiple punishments were precluded under section 654.

Facts

Prosecution Case

Miguel Sanchez owns and operates Southern California Truck Bodies and Sales in Pomona, California, a company that fabricates and repairs commercial truck bodies. The business occupies about two and a half acres, includes a metal building with office space,

---

[1] All statutory references shall be to the Penal Code, unless otherwise specified.

[2] "Before being subjected to 'custodial interrogation,' a suspect 'must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 732, quoting *Miranda v. Arizona, supra, 384 U.S. 436*; *People v. Leonard* (2007) 40 Cal.4th 1370, 1399–1400.)

and is enclosed by a chain-link fence and two gates. The property is monitored by 16 surveillance cameras.

On the evening of December 8, 2007, employee Martin Olmos locked the building and gates. When he returned the next morning, he discovered that the business had been burglarized. Apparently a bolt cutter had been used to cut the chain and padlock off one gate and to cut away a section of the chain-link fence. The door to the building had been opened with a pry bar or crow bar. The men's locker room had been ransacked. Martin Olmos's paycheck, which he had left inside his locker, was missing. Two vehicles were also missing: a green Buick belonging to employee Jose Olmos and a blue Chevrolet Blazer belonging to another employee. A pickup truck belonging to Miguel Sanchez had been stripped of its tires and wheels. Other items were missing, including a metal plasma cutter worth $2,000, and a tool box.

Pomona Police Officer Glenn Stires responded to the business just after 7:00 a.m. on December 9, 2007. Two days earlier, Officer Stires had investigated a theft of an automobile from the business. Officer Stires watched the video recorded by the surveillance cameras, which showed about four or five people entering the premises around midnight and remaining there for more than four hours. Officer Stires could make out three individuals, who appeared to be Hispanic males in their mid-to-late twenties. One of the men had a cleanly shaven bald head and wore a black puffy jacket with a quilted pattern, blue jeans and tennis shoes. Another man had distinctly more hair and wore a dark jacket with white lettering on the front, and the third man had slightly more hair than the first and was more slender than the other two men. The surveillance tapes showed the bald man with the puffy jacket wearing gloves and loading batteries into the Chevrolet Blazer. The tapes also showed all three men actively participating in stripping Sanchez's pickup truck and loading the wheels and tires into the Blazer, and getting into the Blazer and the vehicle in which they had arrived and driving off the premises.

On December 10, 2007, officers were investigating the burglary and patrolling the area for the stolen vehicles. The Chevrolet Blazer was located parked near a residence on

East Center Street (the residence), which was within 300 feet of the business. Around 10:15 a.m., Officer Stires was driving down an alley and saw appellant with a bald head, wearing a black puffy jacket with a quilted pattern, blue jeans and tennis shoes. Appellant walked hastily away from Officer Stires through an open gateway to the rear yard of the residence.

Officer Stires got out of his patrol car and approached the gate to the residence, where appellant's uncle, who was the owner of the residence, was standing. Officer Stires asked him if he had seen the man who has just entered the yard and to call him out. The uncle called out "Walter," and another man whose appearance was consistent with one of the men depicted in the surveillance videos appeared. Officer Stires again asked appellant's uncle to call out appellant. This time appellant came out of a trailer on the property. He was no longer wearing the black puffy jacket. Officer Stires asked appellant where his jacket was, and appellant responded, "what jacket?" Officer Stires instructed appellant to sit down against a wall in the alley. He was not in handcuffs at that time. Other officers were present by then, but none of them had their guns drawn.

Officer Stires walked into the backyard with appellant's uncle. About five minutes later he reemerged and asked appellant a second time where the jacket was. Appellant responded that it was in the trailer. Officer Stires found the jacket in the trailer and also found the missing paycheck from Martin Olmos's locker on the roof of the trailer, just above the doorway. At that point, Officer Stires indicated to the other officers that appellant and the other man on the surveillance videos were to be arrested, and they were placed in handcuffs.

Officer Stires saw a number of tools in the cluttered backyard, including a pair of bolt cutters. After obtaining consent from appellant's uncle, Officer Stires searched the interior of the residence. Various tools were piled in the first-floor living room. A plasma metal cutter was found at the top of the stairs, and additional tools were located in a walk-in closet in a second-floor bedroom. Miguel Sanchez was brought to the residence and was shown and identified some of the tools and other items that had been taken from his business.

Defense Case

Appellant's defense was mistaken identity. His sister testified that: he did not own a black puffy jacket; he had had a large tattoo on the back of his head for two years that was shown to the jury; he did not live at the residence where the stolen items were found, and was only there the morning he was arrested to help his uncle with some painting; and he had two cousins, one of whom lived at the residence, and both of whom had clean-shaven bald heads.

DISCUSSION

I. Admissibility of Statements.

When, as here, we are called upon to consider a claim that a statement is inadmissible because it was obtained in violation of a defendant's rights under *Miranda*, we accept the trial court's resolution of disputed facts and inferences, especially the evaluation of credibility, if supported by substantial evidence. (*People v. Whitson* (1998) 17 Cal.4th 229, 248; *People v. Wash* (1993) 6 Cal.4th 215, 235–236; *People v. Kelly* (1990) 51 Cal.3d 931, 947.) Although we independently determine whether, from the facts as found by the trial court, the challenged statement was illegally obtained, we give """"great weight to the considered conclusions' of a lower court that has previously reviewed the same evidence."""" (*People v. Whitson, supra*, at p. 248.)

It is well established that advisement of *Miranda* rights is only required when a person is subjected to "custodial interrogation." (*People v. Mosley* (1999) 73 Cal.App.4th 1081, 1088 (*Mosley*); *People v. Mickey* (1991) 54 Cal.3d 612, 648.) "Custodial interrogation has two components. First, it requires that the person being questioned be in custody. Custody, for these purposes, means that the person has been taken into custody or otherwise deprived of his freedom in any significant way. [Citation.] Furthermore, in determining if a person is in custody for *Miranda* purposes the trial court must apply an objective legal standard and decide if a reasonable person in the suspect's position would believe his freedom of movement was restrained to a degree normally associated with formal arrest. [Citation.] The test for custody does not depend

on the subjective view of the interrogating officer or the person being questioned." (*Mosley, supra,* at p. 1088, citing *Stansbury v. California* (1994) 511 U.S. 318, 325.) "The second component of custodial interrogation is obviously interrogation. For *Miranda* purposes, interrogation is defined as any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response." (*Mosley, supra,* at p. 1089.)

The trial court found that Officer Stires's questions as to the whereabouts of the jacket were designed to elicit an incriminating response and therefore amounted to interrogation, but that the brief detention of appellant did not amount to custodial status. The parties do not dispute that appellant was subject to interrogation. Rather, the focus of their briefing is whether appellant was in custody at the time of Officer Stires's questioning.

Appellant argues that he was in custody because no reasonable person in his circumstances would have felt free to leave. He points out that when he was first approached by Officer Stires he was in the backyard of a private residence and not out in a public place; that Officer Stires did not ask him if he would answer questions, put him on notice that he was being asked questions in connection with a burglary investigation, or advise him that he was a suspect in the burglary; and that Officer Stires ordered him to sit on the ground in the alley under the guard of other officers who most certainly would have forcibly detained him if he had tried to leave.

But the right to *Miranda* warnings was not designed to apply to "[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process . . . ." (*Miranda, supra,* 384 U.S. at p. 477; *People v. Clair* (1992) 2 Cal.4th 629, 679; *People v. Forster* (1994) 29 Cal.App.4th 1746, 1754, fn. 2.) Thus, persons temporarily detained for investigative purposes are not "in custody" for purposes of *Miranda*. (*Berkemer v. McCarty* (1984) 468 U.S. 420, 440; *People v. Clair*, *supra,* at p. 679.) In conducting a temporary detention for investigation, "the officer may ask the detainee a moderate number of questions to determine his identity and to try to

obtain information confirming or dispelling the officer's suspicions." (*Berkemer, supra*, at p. 439; *People v. Clair, supra*, at p. 679.)

Here, only a brief period of time elapsed between Officer Stires's initial observance of appellant and appellant's ultimate arrest. Officer Stires asked appellant only a couple of questions in order to obtain information. The brief detention took place in a public alley and was witnessed by appellant's uncle and another man. Appellant was not in handcuffs, nor were guns drawn on him.

As the People point out, courts have not found a suspect to be in custody under circumstances involving much longer detentions, even with the use of force or actual physical restraint. (See, e.g., *People v. Clair, supra*, 2 Cal.4th at p. 679 [officer's actions in approaching defendant, who was under the covers in bed, with gun drawn and ordering defendant not to move before asking him questions amounted only to a temporary detention for investigation]; *People v. Forster, supra*, 29 Cal.App.4th at pp. 1753–1754 [defendant not in custody when detained for more than an hour in a customs office]; *Allen v. City of Los Angeles* (9th Cir. 1995) 66 F.3d 1052, 1056 [no arrest where officer pointed gun at suspect, ordered him to lie on the ground, handcuffed him, patted him down, and detained him in a police car for 20 minutes of questioning]; *United States v. Taylor* (9th Cir. 1983) 716 F.2d 701, 708–709 [no arrest where defendant forced from car at gunpoint, ordered to lie face down in ditch, handcuffed and frisked].) It is not the case that "*Miranda* warnings must be given in each instance where police officers initially use weapons or other force to effect an investigative stop." (*People v. Taylor* (1986) 178 Cal.App.3d 217, 230.) Under the circumstances here, we find no error in the trial court's finding that Officer Stires's actions amounted to, at most, a permissible brief and temporary detention for investigation that fell short of "custody" for purposes of *Miranda.* Appellant's statements were therefore properly admissible.

Moreover, any error by the trial court in admitting the statements was harmless beyond a reasonable doubt. Both the United States Supreme Court and the California Supreme Court have held that the erroneous admission of an involuntary or coerced statement is subject to the harmless-beyond-a-reasonable-doubt standard of *Chapman v.*

California (1967) 386 U.S. 18, 24. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310; *People v. Cahill* (1993) 5 Cal.4th 478, 509–510.)

Even without the evidence of appellant's statements feigning lack of knowledge about the jacket and ultimately stating where it was, there was overwhelming evidence of appellant's guilt. The remaining evidence included Officer Stires's testimony as to having observed appellant hastily retreat into an alley that was only about 300 yards from the business that had just been burglarized and that was in the same area where the stolen Chevrolet Blazer was recovered; appellant matched the appearance of one of the men depicted in the surveillance videotapes and was wearing the same clothing, including the distinctive black puffy jacket with the quilted pattern; appellant failed to appear when first called by his uncle and had removed the jacket. With the uncle's consent to search the premises and the house, there can be no doubt that Officer Stires would have found the jacket in the trailer, as well as Martin Olmos's paycheck and the many other items stolen from the business. Indeed, we agree with the People that in light of the balance of the evidence that convincingly proved appellant's guilt, the evidence of his statements about the jacket was relatively unimportant.

We find no merit to appellant's challenge to the admissibility of his statements to Officer Stires.

II. Multiple Punishments.

Appellant contends that the trial court erred in imposing concurrent terms on counts 2 and 3, and should have instead stayed separate sentencing on those counts pursuant to section 654.

Section 654, subdivision (a) provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Whether a course of conduct is considered a single "act" under section 654 depends on the intent and objective of the actor. (*People v. Beamon* (1973) 8 Cal.3d 625, 637; *People v. Rowland* (1971) 21

Cal.App.3d 371, 375.) If all of the offenses were incident to only a single objective, the defendant may not be punished for more than one offense. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) On the other hand, where the defendant can be deemed to have entertained different criminal objectives that were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. (*People v. Beamon*, *supra*, at pp. 638–639; *People v. Blake* (1998) 68 Cal.App.4th 509, 512; *People v. Liu* (1996) 46 Cal.App.4th 1119, 1135; *People v. Green* (1988) 200 Cal.App.3d 538, 543.) Thus, the fact that multiple violations may share common acts or were simultaneously committed is not determinative. (*People v. Coleman* (1973) 32 Cal.App.3d 853, 858.) A trial court's express or implied findings on whether a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence. (*People v. Blake*, *supra*, at p. 512; *People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312; *People v. Palmore* (2000) 79 Cal.App.4th 1290, 1297.)

Appellant was convicted in count 1 of the burglary of Southern California Truck Bodies and Sales. In count 2, appellant was convicted of grand theft of personal property, i.e., Martin Olmos's paycheck and the tools and equipment from the business. In count 3, appellant was convicted of grand theft auto of the blue Chevrolet Blazer. Appellant argues that all of these charges "arose out of the same, indivisible course of conduct or transaction" and that they "were all means of accomplishing the single intent of taking valuable items from the auto body yard" and that "[a]ll of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, namely, the robbery of the sales yard, and thus the offenses can be punished only once." We agree. (See *People v. Le* (2006) 136 Cal.App.4th 925, 931 ["it is apparent that defendant Le's offenses of robbery and burglary were the means of accomplishing the single intent of stealing bottles of whiskey and packages of diapers from the Long's drugstore"].)

The People's argument that separate punishments were not prohibited by section 654 for the offenses of second degree burglary (count 1) and grand theft of personal property (count 2) relies on the following cited language: "'The crime of burglary is complete on the entering of the building with intent to commit a felony, though the intended felony be not committed. Larceny is a separate act and involves the unlawful asportation of the personal property of another, with intent to deprive him thereof; and if a larceny is actually perpetrated after the burglarious entry a second crime is committed.'" (*People v. Goodman* (1958) 159 Cal.App.2d 54, 60–61, quoting *People v. Guarino* (1955) 132 Cal.App.2d 554, 559.) But the People fail to acknowledge that *Guarino* was expressly overruled on this point. (*People v. McFarland* (1962) 58 Cal.2d 748, 762.) In referring to the facts before it, the court stated in *McFarland*: "The evidence, as we have seen, is sufficient to support convictions both of burglary and of grand theft with respect to the taking of the air compressor from the hospital [under construction]. The inference which the jury was permitted to draw in that regard was that defendant entered the hospital with intent to steal and that the taking of the air compressor was the culmination of that intent. The record contains nothing indicating that he entered the hospital with intent to commit some crime other than theft. In these circumstances the only reasonable conclusion is that the entry of the hospital and the taking of the air compressor were parts of a continuous course of conduct and were motivated by one objective, theft; the burglary, although complete before the theft was committed, was incident to and a means of perpetrating the theft. [¶] Thus defendant can be punished for either offense but not for both . . . ." (*People v. McFarland*, *supra*, at p. 762.)

We also disagree with the People that the multiple victim exception to section 654 is applicable here. Under the multiple victim exception, "'"even though a defendant entertains but a single principal objective during an indivisible course of conduct, he [or she] may be convicted and punished for *each crime of violence* committed against a different victim." [Citations.]'" (*People v. Centers* (1999) 73 Cal.App.4th 84, 99, italics added.) The People point out that as to count 3 for grand theft auto, the evidence showed

that the vehicle belonged not to the business but to one of its employees. The People therefore argue that more than one victim was harmed by the burglary of the business and the theft of the vehicle. But "[t]he crime of automobile theft is not a crime of violence but is a violation of property interests." (*People v. Bauer* (1969) 1 Cal.3d 368, 378.) Likewise, burglary does not constitute a crime of violence unless the defendant "inflicted great bodily injury in the commission of the burglary." (*People v. Centers, supra,* at p. 99; see also *People v. Guzman* (1996) 45 Cal.App.4th 1023, 1028.) "Where, however, the offenses arising out of the same transaction are not crimes of violence but involve crimes against property interests of several persons, this court has recognized that only single punishment is permissible." (*People v. Bauer, supra,* at p. 378.) The record before us lacks any indication that appellant inflicted great bodily injury in the commission of the burglary or auto theft. (*People v. Le, supra,* 136 Cal.App.4th at p. 932.)[3]

We therefore conclude that the two-year sentences on count 2 for grand theft of personal property and count 3 for grand theft auto, which were to run concurrently with the two-year sentence on count 1 for second degree commercial burglary, violate section 654. The judgment is modified to stay the sentences on counts 2 and 3 pending completion of the sentence on count 1.

---

[3] We also note that one of the cases upon which the People rely for the multiple victim exception, *People v. Churchill* (1967) 255 Cal.App.2d 448, 452, was expressly overruled by *People v. Bauer, supra,* 1 Cal.3d at p. 378 to the extent it allowed double punishment for the offenses of burglary and automobile theft.

DISPOSITION

The judgment is ordered modified to reflect that the sentences on count 2 for grand theft of personal property and count 3 for grand theft auto are stayed pursuant to section 654. As so modified, the judgment is affirmed. The trial court is ordered to send a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ